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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 *In the Matter of Search Warrants*  
4 *Executed on April 9, 2018*  
-----x

5 MICHAEL D. COHEN,

6 Plaintiff,

7 v.

18 Mag. 3161

8 UNITED STATES OF AMERICA,

Conference

9 Defendant.

-----x

10 New York, N.Y.  
11 April 13, 2018  
12 10:30 a.m.

13 Before:

14 HON. KIMBA M. WOOD,

District Judge

15 APPEARANCES

16 MCDERMOTT WILL & EMERY LLP  
17 Attorneys for Plaintiff  
18 BY: TODD HARRISON  
19 JOSEPH B. EVANS  
MICHAEL R. HUTTENLOCHER

20 ROBERT S. KHUZAMI  
21 Acting United States Attorney for  
22 the Southern District of New York  
23 THOMAS A. McKAY  
24 RACHEL A. MAIMIN  
25 NICOLAS ROOS  
Assistant United States Attorneys

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Also Present:

SPEARS & IMES LLP

Attorneys for Intended Intervenor

Donald J. Trump, President

BY: JOANNA C. HENDON

DAVIS WRIGHT TREMAINE LLP

Attorneys for ABC

BY: RACHEL F. STROM

MICHAEL AVANATTI

Attorney for Interested Party

Stephanie Clifford a/k/a "Stormy Daniels"

John Riley, *Newsday*

Benjamin Weiser, *The New York Times*

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(Case called)

THE COURT: Good morning. Please have a seat.

MR. McKAY: Good morning, your Honor. Tom McKay, Rachel Maimin and Nicolas Roos, for the government.

THE COURT: Good morning.

MR. HARRISON: Good morning, your Honor. Todd Harrison and Joe Evans, from McDermott Will & Emery.

THE COURT: Good morning.

I have a letter from the legal department of *The New York Times*, asking that the press be heard if the Court takes any argument at sidebar or under seal. The law is clear-cut here. I'm not sure that we need a lawyer from *The New York Times*, other than the person who authored the letter to me, but let me state at the outset that Mr. Cohen's lawyers applied yesterday evening for an opportunity to take the first cut at identifying documents that are relevant or not relevant to the investigation, and to identify any documents subject to attorney-client privilege or the work product doctrine.

The arguments that bear on this issue are largely ones having to do with an ongoing criminal investigation and the government's position that flows from that investigation.

Let me also say that although both parties recognize that the search conducted here was a search of attorney's offices and an attorney's devices, and that a search of attorney's information is subject to special consideration

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1 given the possibility of breach of attorney-client privilege or  
2 the work product doctrine, there is no dispute about that. The  
3 dispute before the Court is who should make the determination  
4 in the first instance of what is subject to attorney-client  
5 privilege or the work product doctrine.

6 The government's view is that a taint team should make  
7 that determination, and the view of Mr. Cohen's lawyers is that  
8 the determination should be made either by Mr. Cohen's lawyers,  
9 or their fallback position is a special master.

10 A special master was used in the *Lynne Stewart* case.  
11 I note that in that case there was a heightened need for a  
12 special master because the search swept in documents relating  
13 to clients other than the subject of the investigation and to  
14 work product and otherwise privileged materials of other  
15 lawyers who were in the same law office as Lynne Stewart and  
16 had shared computers with her.

17 I believe that the balance of what needs to be argued  
18 has to be at sidebar and under seal, and I take that decision  
19 not lightly at all, but having reviewed the papers, it's clear  
20 to me that the arguments will reveal the ongoing investigation.  
21 I note, parenthetically, that *The New York Times* seeks access  
22 to the search warrant and related documents. Those, too, are  
23 subject to sealing to protect the ongoing investigation,  
24 notwithstanding the views of the Second Circuit on this point.

25 At this point, I would like to hear --

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1 MS. STROM: Your Honor, I'm an attorney for ABC. My  
2 name is Rachel Strom, and I am not here for *The New York Times*,  
3 but that letter was written by Dave McCraw --

4 THE COURT: Do you want to come to the podium?

5 MS. STROM: That would be great. Thank you so much.  
6 Where would you like me, your Honor?

7 THE COURT: Oh, just by the podium so that the mike  
8 will pick up what you're saying.

9 MS. STROM: I'll note there's no press here for me and  
10 that I was given about a 15 minute warning that I'd be here.

11 Your Honor, I'm sure that letter came from Dave  
12 McCraw, who is an expert in this area. I don't have much to  
13 add. I'm sure he laid out all the *Press Enterprise* factors  
14 that must be considered before a Court will seal the courtroom  
15 or deny access to court records that are necessary for a  
16 determination at a proceeding.

17 The only thing I would say is that the *Press*  
18 *Enterprise* factors require the Court to make specific,  
19 on-the-record findings, as I think you have, but the findings  
20 must include that the closure, or the nondisclosure, must be  
21 essential to preserve a compelling interest. And I think what  
22 you articulated here is the compelling interest is protecting  
23 the attorney-client material.

24 THE COURT: I'm sorry. The compelling interest here  
25 is protecting the ongoing criminal investigation as well as

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1 attorney-client privilege.

2 MS. STROM: But I'm just confused. The fact that  
3 there's an ongoing criminal investigation is already public.

4 THE COURT: Yes.

5 MS. STROM: We're here today because we knew that  
6 there was going to be a hearing today.

7 THE COURT: Of course.

8 MS. STROM: The factors kind of turn in on each other,  
9 and one of the factors is that the closure has to be effective,  
10 that the nondisclosure order has to be effective, and we know  
11 that there's an ongoing proceeding. Many of us do; it's about  
12 as full of a courtroom as I've ever been in. So I don't know  
13 what specific things that will be protected by ordering the  
14 press out of this courtroom or not sealing something, and I do  
15 think we deserve an answer of what specific things will be  
16 protected. And just, because I see I'm going to get an  
17 argument, the other thing --

18 MR. McKAY: Your Honor --

19 THE COURT: Could you wait just a moment.

20 MR. McKAY: I think I may be able to short circuit  
21 this.

22 THE COURT: OK.

23 MR. McKAY: I think it won't be so much an argument as  
24 agreement in part, which is that we filed our responsive brief  
25 this morning with the Court largely publicly. There were few

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1 portions that we redacted for the specific purpose of not  
2 disclosing ongoing law enforcement investigations that weren't  
3 otherwise disclosed, but we were very careful in our brief to  
4 try to talk as much as we could at a high level so that the  
5 right of access would be respected and at the same time we'd be  
6 able to make the points to the Court that we think are  
7 necessary for the Court to resolve the instant motion.

8 We're comfortable today having oral argument in open  
9 court and describing those things which are publicly filed in  
10 our brief, which is really the vast majority of our brief.

11 To the extent that the Court has specific questions  
12 about particular things, including the things that were  
13 redacted or other aspects of the investigation that aren't  
14 already public, we would be happy to go to sidebar on that.  
15 But I think that the inquiry for the present motion need not go  
16 into that great detail about the ongoing investigation, because  
17 we think the issues at stake are clear and can be decided based  
18 on things that are already public.

19 THE COURT: All right. Ms. Strom, have you had access  
20 to what Mr. McKay has described?

21 MS. STROM: If that was public -- was that publicly  
22 filed on Pacer.

23 MR. RILEY: We don't have a case number yet to look up  
24 yet on Pacer, Judge.

25 THE COURT: OK. Thank you.

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1 Ms. Strom.

2 MS. STROM: I have not had access to that.

3 MR. MCKAY: Your Honor, I think that's just a matter  
4 of docketing. We sent it to the Court. I think it will be  
5 publicly filed whenever the Clerk of the Court is able to get a  
6 docket assigned and the briefs up on Pacer.

7 THE COURT: All right. I don't have a redacted copy.  
8 My copy simply says "filed under seal."

9 Yes.

10 MR. HARRISON: Thank you, Judge.

11 THE COURT: Mr. Harrison.

12 MR. HARRISON: Judge, as your Honor noted, we  
13 previously requested that this proceeding be under seal. We  
14 would prefer to do it as your Honor just suggested, at sidebar  
15 and in chambers. We are going to be asking, since the  
16 government apparently is going to be arguing in their favor,  
17 about facts of their underlying investigation, we think we  
18 deserve to know some more of the facts about the underlying  
19 investigation in order to rebut their arguments. That's only  
20 fair.

21 There's another related issue, Judge, which is there  
22 is another attorney in the courtroom today for an individual  
23 privilege holder, who would like to be heard and be part of  
24 these proceedings, and she and we, Mr. Cohen's attorneys, are  
25 going to request that we have some sort of adjournment and some



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1 time for her to get up to speed and, frankly, for us to get all  
2 the way up to speed. I haven't had a chance to read the  
3 government's submission from this morning, so perhaps if we  
4 could have some sort of adjournment to do that and to deal with  
5 all the media issues, perhaps that would be the most prudent  
6 thing to do.

7 MR. McKAY: Your Honor, a few things on that.

8 First of all, the privilege holder has had notice of  
9 these searches on Monday, when they became widely publicly.  
10 The privilege holder in question publicly commented on these  
11 searches. That privilege holder is representing the exact same  
12 interests as Mr. Cohen is here, so he adds absolutely nothing  
13 to the discussion.

14 THE COURT: She.

15 MR. McKAY: She adds nothing to the discussion. And  
16 so the only point of intervention and delay for this privilege  
17 holder to get up to speed, as Mr. Cohen's counsel said, would  
18 be to further delay the review of materials seized pursuant to  
19 lawfully authorized search warrants. We think there's no basis  
20 for this privilege holder to delay these proceedings any  
21 further, and to the extent that Mr. Harrison is saying he  
22 hasn't had time to review the brief, with respect, they filed  
23 their brief shortly after 5:00 last night. We got our response  
24 out in less than -- very quickly, by 9 a.m. this morning. He's  
25 had an hour and a half to read before these proceedings. I

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1 think that falls on deaf ears.

2 THE COURT: I do think that it's important for anyone  
3 asserting an interest in this matter to be able to review the  
4 government letter, and if you haven't had that opportunity, I  
5 think we should adjourn. I would assume that a short  
6 adjournment suffices. In other words, we could resume this  
7 afternoon once you have had a chance to review the letter and  
8 think through the law.

9 MR. McKAY: Your Honor, I think a very short  
10 adjournment would be the most that's appropriate -- about an  
11 hour -- to read the papers, which are only about 22 pages.

12 Again, this privilege holder has had notice of this  
13 since Monday, has likely been in contact with Mr. Cohen's  
14 counsel. The privilege holder's counsel notified us last  
15 night. They've had plenty of time to get involved in this  
16 proceeding. It's just another attempt at delay.

17 MS. HENDON: Your Honor, may I?

18 THE COURT: Yes, you may, but we haven't finished with  
19 Ms. Strom, who is still at the podium.

20 Ms. Strom.

21 MS. STROM: What I would say is that it does sound  
22 like there may be times where there is information that might  
23 meet this compelling-interest need and that there might be a  
24 need for sidebars. Like Dave McCraw, I'd like to be able to  
25 have some opportunity to argue at those junctures, but to kick

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1 the press out completely from a decision-making process --

2 THE COURT: I'm not kicking them out.

3 MS. STROM: OK. I thought you were saying you wanted  
4 to make this decision in private and have it under seal.

5 THE COURT: No. Based on the copy I have of the  
6 government's letter, which is what you have not seen, I thought  
7 that most of what the government argued was going to need to be  
8 under seal. The government has corrected my misapprehension  
9 there.

10 MR. McKAY: Your Honor, if I can?

11 THE COURT: Yes.

12 MR. McKAY: I think the copy that you have has certain  
13 sentences that are highlighted in gray.

14 THE COURT: Yes.

15 MR. McKAY: Those are the ones which are going to be  
16 redacted in the publicly filed copy.

17 THE COURT: I see.

18 MR. McKAY: If you skim through, you'll see it's about  
19 four or five sentences in a 22-page brief. Like I said, we're  
20 comfortable having this proceeding in open court and answering  
21 as many of the Court's questions as we think we can. I think  
22 that the issues here are straightforward and don't require a  
23 deep dive into an underlying criminal investigation.

24 THE COURT: Good.

25 Ms. Strom, the adjourned proceeding that I

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1 contemplate, in an hour or a few hours, would be public to the  
2 extent it can be, and to the extent I find it cannot, I will  
3 make the requisite findings.

4 MS. STROM: Absolutely.

5 THE COURT: And I will allow you to argue at that  
6 point.

7 MS. STROM: Thank you so much, your Honor. We  
8 appreciate it.

9 THE COURT: All right.

10 Now, I believe an attorney wishes to be heard.

11 MS. HENDON: Yes. Thank you, your Honor.

12 My name is Joanna Hendon. It's been a long time since  
13 I was before you. I'm here with my partner Chris Dysard and my  
14 colleague Reed Keefe. It's very nice to see you.

15 We represent Donald Trump in this matter. As a  
16 privilege holder, he has an acute interest in these proceedings  
17 and in the manner in which these materials are reviewed, etc.  
18 Your Honor, I therefore request permission to be heard with  
19 respect to the issues that have been, at least I understand,  
20 briefed by Mr. Cohen's counsel.

21 Now, I should say my firm was engaged Wednesday  
22 evening, April 11. That's a day and a half ago. Last night, I  
23 contacted the U.S. Attorney's Office on behalf of the privilege  
24 holder, whose interests are different and not entirely the same  
25 as the lawyer, because the privilege belongs to the privilege

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1 holder, not the lawyer. A client can waive the privilege. The  
2 lawyer cannot waive the privilege.

3 I contacted the government and I conveyed my concern  
4 about the use of a taint team. I conveyed my concern about the  
5 mechanism by which even after a review of the documents has  
6 been done -- whether by a taint team or by a special master --  
7 the mechanism by which parties may then make objections to and  
8 seek judicial review of those decisions, because the most  
9 critical moment here, your Honor, for a privilege holder, is  
10 when a special master or a taint team, or whomever has  
11 conducted a review, made a judgment about what is not  
12 privileged and then turns to hand that material over to the  
13 prosecution team, who will then make charging decisions and  
14 otherwise.

15 THE COURT: Wait just a moment.

16 MS. HENDON: I plan to raise --

17 THE COURT: May I interrupt you.

18 MS. HENDON: Yes, of course, your Honor.

19 THE COURT: There hasn't been a determination as to  
20 whether the prosecution team would have access to those  
21 documents before the privilege holder or the attorney can be  
22 heard.

23 MS. HENDON: Oh, I understand, your Honor. I'm just  
24 letting you know that in a day and a half we identified these  
25 issues for our client, conveyed them in writing to the office

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1 last night and said, Look, can we sit down with you and see if  
2 we can reach agreement on both of these questions, who does the  
3 review and what's the mechanism for judicial review? I said,  
4 Look, Can you agree not to touch these documents and begin a  
5 review until we've met and conferred and, if necessary, engaged  
6 in any litigation and come to the Court.

7 What I am asking today, your Honor -- and I know the  
8 government objects to this, because I met and conferred with  
9 them to get their views; I think Mr. Cohen's counsel is  
10 amenable -- I am not prepared, even with two hours' notice, to  
11 vindicate this very important right on behalf of my client in  
12 this matter. These parties apparently have filed papers. I've  
13 not seen what Mr. Cohen filed. I've not seen what the  
14 government filed, and given the interest at stake here and the  
15 exceptional nature of my client, giving me two hours to get up  
16 to speed so that I can come make oral argument before your  
17 Honor makes very important decisions is simply inadequate.

18 What I would ask, what I thought would be best was  
19 that we have a -- I'm not trying to delay anything, nor do I  
20 see a particular rush here. The searches have been executed.  
21 The concerns typically announced in a search warrant affidavit  
22 about the need for expediency because evidence will be  
23 destroyed, those searches have been executed. The evidence is  
24 locked down. I'm not trying to delay. I'm trying to make  
25 sure -- I think everyone, the Court, the government, my client,

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1 the public, all have an interest in how this review of  
2 privileged material takes place. The interest is that it be  
3 done scrupulously, so that it's not subject to taint complaints  
4 later, so that it withstands scrutiny for all time, frankly.

5 I don't see that we need to rush these proceedings. I  
6 think my client should be allowed to join in a briefing  
7 schedule. We should get this litigation that your Honor was  
8 prepared to address today on the track for next week or the  
9 week after and let the owner of the privilege participate  
10 alongside the government and the individual whose materials  
11 were seized, and do this in an orderly way, because what's at  
12 stake, the viability of this prosecution, it has to be done  
13 right.

14 My client's interests as a privilege holder -- this is  
15 the oldest privilege, I think, one of them, that our law  
16 recognizes; he is the President of the United States. These  
17 interests are so weighty that I think we need more than,  
18 respectfully, an afternoon's adjournment so that I on his  
19 behalf can weigh in thoroughly and be heard on these issues,  
20 because ultimately, in my view, this is of most concern to him.  
21 I think the public is a close second and anyone who has ever  
22 been represented, everyone who's ever hired a lawyer a close  
23 third. And I just want to say that I don't want anyone in this  
24 room to take from my remarks any lack of confidence in the way  
25 the United States Attorney's Office in this district is

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1 prepared to conduct itself, but there's an  
2 appearance-of-fairness problem here.

3 In addition, there has been so much media coverage of  
4 the matters under investigation, of my client, that the idea  
5 that anyone could neutrally and fairly pick up communications  
6 between him and Mr. Cohen and make privilege calls, that's  
7 going to be a very, very heavy lift for anyone. And I think  
8 the prosecutors, who are properly trained to investigate and  
9 rule out evidence of crimes, they would not be my first choice,  
10 even though they're the best prosecutors in the country, for  
11 that work and for that role.

12 I thank your Honor.

13 THE COURT: Thank you very much.

14 Mr. McKay rose to speak.

15 MR. MCKAY: Counsel just referenced the appearance of  
16 fairness and the exceptional nature of her client, and with  
17 respect, his attorney-client privilege is no stronger than any  
18 other person who seeks legal advice. He has been on notice of  
19 this search since Monday. There's no excuse for the late  
20 intervention, and his interest is undifferentiated from  
21 Mr. Cohen's here. It's just a question of who is asserting it.

22 There is no question in Mr. Cohen's papers that he is  
23 asserting the privilege on behalf of his client, and he's doing  
24 so with very experienced, very qualified counsel. There's no  
25 danger that the privilege holder's interest is going to be not



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1 represented here. If Mr. Cohen were prepared to waive  
2 privilege on behalf of some clients and weren't objecting to  
3 our search in the manner he is, there would be a different  
4 analysis. But here, where Mr. Cohen is asserting the  
5 privilege, which Mr. Trump also intends to assert, there's no  
6 reason that -- well, there's no differentiation between the  
7 arguments that he would make.

8 If Ms. Hendon wants an hour to read the papers so that  
9 she can see if there are any unique arguments that she ought to  
10 make, we don't object to that, but we absolutely do object to  
11 this last, second intervention, which would further delay our  
12 lawful review of materials that were seized pursuant to a  
13 federal search warrant.

14 THE COURT: Please.

15 MR. HARRISON: Just very briefly, Judge.

16 I join in Ms. Hendon's application, and the other  
17 problem with just adjourning for a couple hours, while it might  
18 give me time to read the government's 20-plus-page filing, it  
19 won't give me time to do research on it and things like that,  
20 which I can't do from the courthouse here, unfortunately. I  
21 don't feel like we'd be able to fully prepare --

22 MR. McKAY: Your Honor, Mr. Cohen --

23 THE COURT: One second.

24 MR. HARRISON: -- that I would be able to fully  
25 prepare within that short period of time, and I really don't

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1 see the problem -- we do have these weighty issues, which  
2 Ms. Hendon so eloquently laid out for the Court -- why there's  
3 a problem with adjourning to, say, even just Monday, a couple  
4 of days.

5 THE COURT: I was about to propose an adjournment  
6 until Monday. I'm happy to hear Ms. Hendon whenever she wishes  
7 to be heard. It appears to me that the interests are  
8 completely parallel with those of Mr. Cohen, but if you'd like  
9 to be heard, I'd be glad to hear you so long as there's no  
10 undue delay. I propose that we resume on Monday after  
11 everyone's had a chance to review the government's letter and  
12 consider, I must say, the very sparse law that applies. I  
13 think probably everyone in this courtroom is familiar with the  
14 right of the press and the public to judicial documents.

15 Go ahead, Ms. Hendon.

16 MS. HENDON: Can I just have a moment with my  
17 colleague?

18 THE COURT: Yes.

19 MS. HENDON: That's fine, your Honor. Thank you very  
20 much.

21 THE COURT: All right.

22 Mr. McKay, you jumped up. Did you want to be heard  
23 again?

24 MR. MCKAY: No, your Honor. I'd just note our  
25 objection to the adjournment.

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1 I will note for the record that in light of the  
2 Court's adjournment, we will not begin our review of the  
3 materials until whenever we reappear on Monday.

4 THE COURT: All right. I propose 2:00 on Monday.

5 MR. HARRISON: That works for us, your Honor.

6 MR. McKAY: Fine for the government, your Honor.

7 THE COURT: Good.

8 MR. McKAY: Your Honor, if I may?

9 Given that Mr. Cohen filed his papers around 5 p.m.  
10 last night and we responded by 9 a.m. this morning, we put a  
11 deadline on Mr. Trump's time to weigh in, which is not the last  
12 minute, so that if there are any differentiated arguments we'll  
13 have an opportunity to file our responsive brief before Monday.

14 THE COURT: All right.

15 Ms. Hendon, if you have any arguments that are  
16 different from those made by Mr. Cohen, could you give me a  
17 filing describing that by 11 a.m. on Monday.

18 MS. HENDON: Yes, your Honor.

19 THE COURT: Thank you.

20 MR. McKAY: Your Honor, if I may?

21 If it's 11 a.m. on Monday, we won't have an  
22 opportunity to file a responsive brief by 2 p.m. Can we make  
23 it sometime on Sunday so that we can get our filing in by  
24 Monday morning?

25 THE COURT: All right. Ms. Hendon, could you have it

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1 by 3:00 on Sunday?

2 MS. HENDON: No, we can't, your Honor. I've conferred  
3 with my team. We can have papers filed by 10:00 Monday  
4 morning, and if we need to slide the hearing, I would  
5 respectfully ask that we do that. We're already talking about  
6 48 hours to put a brief together on this issue. I think the  
7 most that we reasonably can be asked to do.

8 THE COURT: I said, and I'm sure of this, that the law  
9 is very sparse on the issues here and that no one is likely to  
10 uncover any case law that hasn't already been uncovered in the  
11 filings.

12 MS. HENDON: Your Honor, we could file by Sunday  
13 night, 9:00. I can't do it by Sunday at 3 p.m.

14 These are important matters, and for me, Judge, even  
15 when there's sparse case law, it takes me a long time to  
16 satisfy myself that there is sparse case law. We pride  
17 ourselves on careful, thorough, meticulous work product, and I  
18 really feel that I'm being rushed here.

19 THE COURT: You're proposing Sunday at?

20 MS. HENDON: Sunday at 9 p.m.

21 THE COURT: Mr. McKay.

22 MR. MCKAY: Your Honor, that's fine. We'll respond by  
23 then.

24 I just want to note again that this is a TRO brought  
25 by Mr. Cohen, not by the government, so these claims of undue

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1 rush are a little strange coming from the person who brought  
2 the motion for a TRO and the privilege holder for whom he's  
3 making the motion. We will respond whenever the papers come  
4 in, your Honor, but I just want to note that.

5 THE COURT: All right.

6 MR. HARRISON: I'm happy to respond if you want me to.

7 THE COURT: I think I understand what the response  
8 would be, which is that the rush has to do with whether the  
9 government will have immediate access to any potentially  
10 privileged or work product documents.

11 I have a few questions that I think might short  
12 circuit some of this, and I'm loath to state them in public  
13 until I understand whether they should be privileged, so I'll  
14 ask counsel to come to sidebar with the court reporter. These  
15 will be very brief and narrow.

16 MS. STROM: Your Honor, I'm sorry. Before you do a  
17 sidebar, could you just give the on-the-record findings about  
18 why the nondisclosure of these questions will serve a  
19 compelling need and how the nondisclosure for the sidebar will  
20 be effective and narrowly tailored.

21 THE COURT: Yes.

22 MS. STROM: Thank you, your Honor.

23 THE COURT: My question will be very narrowly tailored  
24 and the higher interest that I identify is the protection of  
25 any innocent parties whose information may be divulged.

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1 MS. STROM: By your questions.

2 THE COURT: By the answers to my question, both my  
3 questions and the answers to them.

4 MS. STROM: OK. And the one question, you'll be  
5 having a sidebar for just the question and the answer that will  
6 go to the types of information you're hoping to see in the  
7 briefs? Is that what this is about?

8 THE COURT: They have to do with whether there's a  
9 factual basis for certain arguments being made.

10 MS. STROM: Thank you, your Honor. I just wanted to  
11 notify the Court that I will not be here on Monday. I have  
12 another matter that will take me away, but we will find someone  
13 on Monday to appear for the sidebar.

14 THE COURT: Thank you.

15 (At sidebar)

16 THE COURT: In order for me to understand --

17 (In open court)

18 MS. STROM: Your Honor, can I just ask one question?

19 If the secrecy is so essential here, why are  
20 Mr. Trump's lawyers able to be at the sidebar and we are not?

21 THE COURT: Actually, I don't need Mr. Trump's lawyers  
22 here for this question.

23 I'm sorry, Ms. Hendon.

24 MS. HENDON: That's all right.

25 THE COURT: Thank you for pointing that out.

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(At sidebar)

THE COURT: In order for me to gain an understanding of what delay would necessarily ensue if a special master were the inspecting person rather than the government taint team, I need to know how many clients Mr. Cohen has whose documents have been seized.

MR. HARRISON: That's a good question, Judge. I don't have an exact number for you.

THE COURT: I expected that you wouldn't have an answer, and I want you to contact your client and get me the answer.

MR. HARRISON: Sure. Will do.

Part of it's a little complicated, Judge, because as we put in our papers, he did have an affiliation with another law firm and he was on a lot of communications and things with a number of those clients, as I understand it, from that law firm.

THE COURT: I'll need to have you identify all of that given the government's contention that Mr. Cohen did not have access to the bulk of it, not all of the law firm's privileged communications.

MR. HARRISON: OK.

(In open court)

THE COURT: Could the spectators please step outside if you wish to speak.

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(At sidebar)

MR. HARRISON: We'll do that, your Honor. I haven't read their papers yet, but I assume that's what they say in their papers, so we'll read that and figure it out.

THE COURT: I see.

I'll be asking the government when we have the adjourned proceeding to identify precisely how appointment of a special master would cause more delay than a government taint team. Without having heard from the government, I anticipate that the argument may be that the taint team is already up to speed with respect to the investigation, and hence, there won't be any delay for them in getting up to speed, but how long the delay would be in getting up to speed is something I need to know. If, for example, the special master can be briefed on the relevant issues and the likely scope of any crime fraud exception, it doesn't seem that there would be much delay.

MR. McKAY: Your Honor, I can answer that in part now. I'm happy to elaborate further, but it's not just the delay in getting up to speed and getting a special master selected. It's that this is a fast-moving investigation.

We are devoting a large amount of resources to the whole case but, in particular, to our filter team to get this review done very quickly. We reference in our brief that we've already searched email accounts. We did our privilege review of those remarkably quickly because of the size of our filter



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1 team and the hard work that they're doing.

2 With all respect, I'm sure you could find a special  
3 master who's willing to work very hard, but the example that  
4 you have in this district is the *Stewart* case.

5 THE COURT: I know, 15 months.

6 MR. McKAY: And that was 15 months for them to even  
7 do, and before that wasn't even done, I don't know how long it  
8 ultimately took to respond, to produce the report. Judge  
9 Koeltl in that very opinion -- in *Sattar* -- I think it is,  
10 laments the appointment of the special master and the delay  
11 that arose. So it's not just that. As well, if the special  
12 master is making the identifications in the first instance --  
13 first of all, I want to note that their proposal to have the  
14 special master do responsiveness, not just privilege, is  
15 completely divorced from their alleged harm.

16 THE COURT: I agree.

17 MR. McKAY: With respect to the privilege, part of the  
18 delay is that if the special master is making the first  
19 determination of privileged materials, the government, the  
20 filter team, will be unable to understand the context of what  
21 is going on with these privileged materials without seeing the  
22 documents.

23 By contrast, Mr. Cohen understands, because he's going  
24 to be the author of these documents; he likely has access to  
25 them anyway, so we're severely handicapped in our ability to

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1 understand the privilege determinations, and that's going to  
2 result in protracted and costly litigation. It's going to  
3 delay our investigation. It's going to be burdensome on the  
4 special master and the Court's resources, and so experience  
5 suggests, we think, that a special master is a very  
6 time-consuming process. And even more importantly, I think,  
7 even if the Court were inclined to appoint a special master,  
8 the request to have a special master review everything for  
9 privilege is likely overbroad.

10 As we set forth in our brief, we think the universe of  
11 privileged materials is likely to be a fraction of what was  
12 actually seized, and the large majority of emails or  
13 communications or documents which may have been seized quickly  
14 could be identified as not privileged by the use of simple  
15 search terms, for instance, knowing individuals with whom  
16 Mr. Cohen undoubtedly does not have an attorney-client  
17 communication. A backup proposal could be, and this would help  
18 the delay of a special master to some degree, to agree on a  
19 unique set of calls or determinations that a special master's  
20 required to make.

21 For example, if the Court were compelled by some  
22 unique argument on behalf of Mr. Trump, you could have sorting  
23 of only those potentially privileged communications involving  
24 Mr. Trump and have a special master make the first  
25 determination as to those only, but as to the broader universe

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1 of documents, it would be much more efficient to have the  
2 filter team making the judgment in the first instance.

3 THE COURT: Now, there is a process point that I don't  
4 understand. In the *Stewart* case, Lynne Stewart's lawyers were  
5 given a copy of all of the documents, etc., that were seized.  
6 They then decided what information they would argue was subject  
7 to the privilege. I believe they then conferred with the  
8 government, and where there was not agreement, it went to the  
9 Court. The problem in the *Stewart* case is that the preparation  
10 of the privilege log took months instead of the days or weeks  
11 that had been conveyed would be enough, and I'll be looking to  
12 Mr. Cohen's lawyers to tell me how quickly they could prepare a  
13 privilege log.

14 MR. McKAY: Your Honor, I would say that, as we make  
15 clear in our papers, we think we have a more efficient proposal  
16 than that, which is that when the filter team makes the first  
17 review, there is a certain subset of documents with which we  
18 would be perfectly willing to consult with the privilege holder  
19 or the Court, depending on the nature of the call. For  
20 instance, if Mr. Cohen would give us a client list, which he's  
21 refused to do to date, we could run emails or communications  
22 between Cohen and any clients, and any of those that we marked  
23 nonprivileged or potentially privileged as opposed to us making  
24 a call, You know what, this is privileged, we're not going to  
25 look at, we could present those to Mr. Cohen, he could raise

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1 objections and any disputes could be brought to the Court or to  
2 a special master.

3 We think that would be a far more efficient procedure  
4 than having defense counsel who, with respect, has every  
5 incentive to delay. They can commit all they want to making a  
6 privilege log. They have every incentive to delay this matter,  
7 because there is an ongoing criminal investigation of their  
8 client, and delay is very, very good for them.

9 THE COURT: I don't yet quite understand the point at  
10 which defense counsel would have the opportunity to claim  
11 privilege.

12 MR. McKAY: Under our current filter protocol  
13 proposal, we would run clients' names and attorney names and a  
14 series of search terms that hit on or were keyed to identifying  
15 potentially privileged materials. We would then have the  
16 filter team make the initial review. Anything that fell within  
17 the category of attorney-client, whether between Cohen and  
18 client or Cohen and attorney, and we marked them either not  
19 privileged or subject to an exception, such as crime fraud or  
20 waiver, those things we'd be willing to present to defense  
21 counsel.

22 And like I say, as we say in the brief, we think this  
23 is going to be a very narrow universe of documents, and that's  
24 the reason why we think this is going to be the most efficient  
25 protocol. If you start with the shoe on the other foot, with

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1 respect, defense counsel has every incentive to be overbroad in  
2 their privilege calls, and we're going to have much more  
3 protracted litigation over privilege issues than if the  
4 government can in the first instance narrow the universe to the  
5 things about which we might reasonably.

6 MS. ZORNBERG: Lisa Zornberg with the criminal  
7 division.

8 We're getting reports that the audio of your sidebar  
9 is on in the overflow room.

10 THE COURT: It's got to be off.

11 I believe that counsel should return at some point  
12 this afternoon to answer the question how many other clients  
13 Mr. Cohen had with respect to whose documents would have been  
14 seized in the search and how large Mr. Cohen believes the set  
15 of privileged or work product-protected documents would be  
16 compared to the overall amount of information. Is he claiming  
17 80 to 90 percent, which is what I would have guessed from his  
18 past privilege claims, which seem indeed overbroad, or are we  
19 looking at maybe 5 percent?

20 The volume matters in terms of delay.

21 MR. HARRISON: Sure.

22 MR. McKAY: Your Honor, if I may, we've asked defense  
23 counsel for a client list.

24 THE COURT: I know.

25 MR. McKAY: We'd ask that if they're giving a number

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1 today they give names.

2 THE COURT: OK.

3 MR. McKAY: And we do that for two reasons. One is  
4 that if we are going to be doing the first review, it's  
5 important to us that we know the names of the clients so at  
6 least we can make our search as accurate as possible. But the  
7 second is we already have considerable amounts of information  
8 about Mr. Cohen's activities, and so to the extent that they're  
9 making overbroad claims today about their client list, we'd  
10 like the ability to challenge those, because we want to make  
11 sure that the Court is given an accurate estimate of the number  
12 of clients.

13 THE COURT: All right. I believe a client list should  
14 be provided.

15 Yes.

16 MR. HARRISON: If I can just respond to some of the  
17 things that Mr. McKay has said?

18 THE COURT: I think we'll need to speak more slowly  
19 than we've been speaking.

20 MR. HARRISON: The issue really does come down in this  
21 conversation to who reviews the materials first. It's our  
22 position there's already been a Fourth Amendment violation,  
23 because I think we all would agree that the government has  
24 seized materials that are beyond the scope of the warrant.

25 MR. McKAY: We would not agree with that.

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1 THE COURT: I believe that this part of the argument  
2 doesn't need to be made now.

3 MR. HARRISON: Then I'll just respond -- I'm just  
4 trying to respond to what Mr. McKay has already said.

5 THE COURT: Yes.

6 MR. HARRISON: I'll say that.

7 I'll also say I do not think that it would take long  
8 to appoint a special master. I do not think it would take long  
9 to get a special master up to speed. We already have someone  
10 in mind, and we're happy to work with the U.S. Attorney's  
11 Office on rules and guidelines for that special master, which  
12 we're happy to do very quickly, so I don't think that process  
13 would take very long.

14 THE COURT: These, I note, are the same arguments that  
15 were made to Judge Koeltl in the *Stewart* case, and as Mr. McKay  
16 pointed out, Judge Koeltl later rued the day that he allowed  
17 defense the time they said they needed, because it was so much  
18 more time than defendant had argued would be needed.

19 MR. McKAY: Your Honor, we agree, and also, defense  
20 counsel says they have someone in mind for the special master.  
21 We respectfully request, if the Court's considering that, that  
22 it be someone the Court pick, not who defense counsel picks.

23 THE COURT: There is no harm in attorneys suggesting  
24 names, but I, of course, would be the appointing person if the  
25 special master is appointed.

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1 MR. McKAY: Thank you, your Honor.

2 MR. HARRISON: Of course, your Honor. I didn't mean  
3 to suggest anything different.

4 THE COURT: I understand.

5 MR. HARRISON: In relation to the client list, Judge,  
6 they keep saying we refuse to turn it over as if we at this  
7 point have some obligation -- I know your Honor just directed  
8 us to, but prior to now, that we have some obligation to turn  
9 over our client list.

10 The reason we haven't turned over a client list is we  
11 don't think it's appropriate at this point. The Court hasn't  
12 decided the issue of who is going to be reviewing this stuff  
13 first, and that really goes to the heart of the arguments as to  
14 who should be reviewing it first. If there are clients that  
15 are totally unrelated to their investigation, they shouldn't  
16 get that client list and interview those people and try and get  
17 dirt on my client.

18 THE COURT: This is, I think, a specious argument. To  
19 say that you have refused to give it does not suggest that you  
20 have an obligation to give it. It just suggests that the  
21 government asked for something and you refused to give it at  
22 that point.

23 The reason I think it's important to have it now is,  
24 first, I believe that what I've seen so far of Mr. Cohen's  
25 lawyers' arguments about privilege suggests to me that your



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1 view of the privilege is much broader than the law permits, and  
2 hence, I think that needs to be checked.

3 Secondly, my determination needs to be based in part  
4 on how long it will take anyone -- a special master, a taint  
5 team, the Court -- to deal with the universe of potentially  
6 privileged or work product-protected documents.

7 All right. Now, before I learned that the feed was  
8 on, it was on my mind to ask at the end of this sidebar, could  
9 each side please review everything said at sidebar and let me  
10 know what needs to be sealed and what does not need to be  
11 sealed and try to reach agreement on that.

12 MR. HARRISON: Sure.

13 THE COURT: In terms of the client list and universe  
14 of privileged documents or potentially privileged documents, I  
15 assume you could learn that in an hour or two. Is that right?

16 MR. HARRISON: I'll do my best.

17 THE COURT: Is that fair?

18 MR. HARRISON: Probably, Judge. I'll do my best.

19 THE COURT: Why don't we resume at 2 p.m. here.

20 MR. HARRISON: I would request, Judge, that that  
21 information be filed under seal.

22 THE COURT: I agree.

23 MR. HARRISON: I think potentially innocent third  
24 parties, who are totally unrelated to my client, should be kept  
25 under seal.

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1 THE COURT: That's why I'm hearing you at sidebar.

2 MR. HARRISON: Thank you, Judge.

3 MR. McKAY: Your Honor, just to note, we don't object  
4 to the client list being under seal. We don't think anything  
5 said at this sidebar needs to be sealed. We didn't go into any  
6 detail about the investigation beyond what we said in our  
7 papers, so we have no objection to this being in open court.

8 THE COURT: All right. If you have an objection, you  
9 need to let me know by 2. Otherwise I'll be releasing it. I  
10 think Mr. McKay is right.

11 MR. HARRISON: OK. And we're coming back here at 2,  
12 Judge?

13 THE COURT: Yes.

14 MR. HARRISON: Just to respond briefly to what Mr.  
15 McKay said, we're not trying to delay anything, Judge. We've  
16 been moving quickly. We're not asking for long delays. We  
17 don't have an interest in delay.

18 THE COURT: I understand.

19 MR. HARRISON: The only other thing I'll say -- I'll  
20 save the rest of my arguments for later, Judge.

21 THE COURT: Thank you very much. See you at 2.

22 (In open court)

23 THE COURT: I'd like to note for those still in the  
24 courtroom that I believe it is likely that a transcript of what  
25 transpired at sidebar can be made public, but I need to hear

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1 argument from the attorneys when they've had a chance to think  
2 through the issues before I do that.

3 I will be convening here with the attorneys for  
4 Mr. Cohen and the government to flesh out some facts that I  
5 believe will be relevant to whether a special master needs to  
6 be appointed or whether a government filter team or taint team  
7 should be the filtering body.

8 MR. RILEY: I'm confused, Judge. John Riley from  
9 Newsday. You're saying that you're going to be convening in  
10 private or in public session to discuss that? If it's private,  
11 I would object.

12 THE COURT: I understand. I'm not surprised to hear  
13 that you object. I've enjoyed your objections in the past, and  
14 not to demean them, they're always well-taken but not  
15 necessarily adopted by the Court.

16 I believe that what I will be hearing at sidebar  
17 relates to potentially innocent individuals being identified  
18 and their privacy interests being invaded if what I'm going to  
19 hear is public. That's my rationale at this point, and I  
20 believe that that's a higher interest than the need of the  
21 press and the public to learn this information.

22 MR. RILEY: Just so I can explain to our lawyers at  
23 Newsday and the *Times*, is this something you're talking about  
24 occurring on Monday when this hearing reconvenes or something  
25 that is going to occur prior to the reconvening of this

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1 hearing?

2 THE COURT: What I intend to learn at 2 p.m. consists  
3 of facts that might invade the privacy interests of any  
4 innocent person.

5 MR. RILEY: You're talking about 2 p.m. today.

6 THE COURT: 2 p.m. today.

7 MR. RILEY: And you intend to close the courtroom for  
8 that hearing and exclude us?

9 THE COURT: I intend to hear the parties as to whether  
10 it should be closed, and I may close it. Let me say I'll be  
11 glad to hear from the press as to whether a transcript of that  
12 should be made public, but in the first instance, I need to  
13 hear the attorneys in a sealed proceeding, and I know you  
14 object.

15 MR. RILEY: So you intend to -- you have decided it  
16 will be closed at 2:00 but will consider unsealing the  
17 transcript afterwards, or will we be allowed to be heard at  
18 2:00 with lawyers for the media arguing that it should not be  
19 sealed in the first place?

20 THE COURT: I'll be glad to hear you if you like, but  
21 I'm very familiar with the public interest in transparency, and  
22 it would be only if I'm quite certain that innocent  
23 individuals' privacy interests would be invaded if the public  
24 had this information.

25 MS. STROM: Your Honor, I would love to be heard at

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1 that hearing, because it seems to me that we should at least  
2 consider less restrictive means. For example, if there are  
3 certain individuals that we're worried about, we could give  
4 them pseudonyms. Or at least when we're arguing about why the  
5 proceedings writ large must be public, there must be ways that  
6 we can have pseudonyms or just not state the person's name  
7 while we're discussing the larger interest of who should be  
8 reviewing these materials and what types of information would  
9 be in the materials. It seems to me there are less restrictive  
10 means than just not allowing us at all.

11 THE COURT: I think you're making a good point, and  
12 I'll ask counsel to consider whether pseudonyms would solve the  
13 privacy interests.

14 MR. McKAY: Your Honor, from our perspective, as long  
15 as we understand what the pseudonyms are, we don't object. I  
16 think we could propose a hybrid procedure where the specific  
17 question that you propose to defense counsel that calls for  
18 some names, those names might be given at sidebar, but the  
19 discussion that follows, as long as specific names are not  
20 used, could be in open court.

21 MS. STROM: To me, that seems like a great  
22 alternative. I understand that there are extraordinarily  
23 compelling interests for keeping innocent people's names out of  
24 these, but there are extraordinarily compelling interests on  
25 the other side that I don't think we've articulated. The press

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1 and the public are so interested in this governmental  
2 investigation and also on the idea of when it's appropriate to  
3 breach attorney-client privilege; when the government can look  
4 at attorney-client privileged documents, who should be the  
5 person that is able to search these documents in the first  
6 interest. This is something the President has been tweeting  
7 about. This is something that's on the front page of every  
8 newspaper in the country, and to exclude us completely from  
9 these proceedings, I think, is something we need to keep in  
10 consideration. If there's a way to have a hybrid procedure  
11 where we keep the names out, it seems to me, would be a good  
12 alternative.

13 THE COURT: I think you've made a very good point.  
14 The government accepts it.

15 Do Mr. Cohen's lawyers wish to weigh in on this?

16 MR. HARRISON: Judge, could we approach very briefly  
17 for one second? Something else that I just thought of related  
18 to the Court's request.

19 THE COURT: All right. I'll hear you briefly at  
20 sidebar.

21 (At sidebar)

22 MR. HARRISON: Judge, I just want to front an issue  
23 for you. I'll make sure to go try and find out the answers to  
24 the close questions for sure. It occurred to me, I don't know  
25 this for sure, but there may be clients of Mr. Cohen's that

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1 have a privacy interest in not having the government know that  
2 they've been talking to him, so I don't know if we're going to  
3 have to go get permission from the clients to reveal their  
4 names to the Court and to the government.

5 I haven't thought about that issue yet. Maybe it's  
6 not an issue. I don't know.

7 MR. McKAY: Your Honor, I think that a list of client  
8 names is not covered by the privilege. The mere fact of the  
9 representation is not privileged.

10 THE COURT: That's correct.

11 MR. HARRISON: I'll try and look at the law really  
12 quickly, but I think it might be in some instances. I don't  
13 know if that's the case here. Maybe it's not.

14 Come on, Tom. You're not deciding it right now. Come  
15 on.

16 THE COURT: No, we're not deciding it right now.

17 MR. HARRISON: OK.

18 THE COURT: If you have any authority that a client  
19 list is privileged, I want to have you bring copies of the  
20 decisions with you.

21 MR. HARRISON: Sure. Thank you, Judge.

22 THE COURT: OK. Thank you. A copy for the government  
23 and for the Court.

24 (In open court)

25 THE COURT: Let's talk about what happens next.

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1           At 2:00, I'll be glad to hear the press, anyone from  
2 the press, if you wish to be heard, and at that point, I will  
3 hear counsel at sidebar to learn whether the information in  
4 question should be under seal or not. I don't yet know what  
5 their arguments are, but I can't make the decision without  
6 hearing you and without hearing them.

7           MS. STROM: Thank you, your Honor. I appreciate the  
8 opportunity.

9           THE COURT: Yes.

10          MR. AVANATTI: Your Honor, could I be heard briefly?

11          THE COURT: Yes.

12          MR. AVANATTI: Michael Avanatti. I represent  
13 Stephanie Clifford, otherwise known as "Stormy Daniels."

14               I would like an opportunity at 2:00 to weigh in on  
15 this issue relating to the privacy, or lack thereof, concerning  
16 the documents. We have every reason to believe that some of  
17 the documents that were seized relate to my client and, in  
18 fact, may impact this privacy issue that the Court is speaking  
19 about, so I would like the opportunity to address the Court  
20 briefly at 2:00.

21          THE COURT: I'll give you that opportunity.

22          MR. AVANATTI: Thank you, your Honor.

23          THE COURT: Would anyone else like to be heard at this  
24 point?

25          MR. RILEY: Judge, I just don't know the case number



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1 yet, and we have no capacity to follow what is and isn't sealed  
2 and what has or hasn't been filed without a case number to look  
3 up on Pacer. That would be very helpful.

4 THE COURT: Can the government help with identifying  
5 how the press would learn what's public?

6 MR. McKAY: Yes, your Honor. We'll ask the clerk's  
7 office to see if they can assign a case number speedily, if it  
8 hasn't already been assigned, and then we can provide that  
9 number, I suppose. I suppose the Clerk of Court's press office  
10 will be provided with that number and can communicate it.

11 THE COURT: All right. Is there a member of the press  
12 you would designate to be your point person who can then  
13 communicate with the rest of the press?

14 MR. RILEY: We all will.

15 MR. WEISER: I think we all can.

16 THE COURT: Very good.

17 We're adjourned. Thank you.

18 (Recess)  
19  
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22  
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## AFTERNOON SESSION

2:00 p.m.

MR. HARRISON: Judge, could I have 30 seconds?

THE COURT: Yes.

While he takes that 30 seconds, I'd like to ask anyone else who is with Mr. Harrison to review the transcript of what occurred at sidebar to make sure that it can be released publicly. The government has said it can. I believe it can. I just need to have you review it.

Mr. Harrison, are you ready?

MR. HARRISON: Yes, Judge. Could we approach the sidebar, please?

THE COURT: Why?

MR. McKAY: Your Honor, we don't think there's any basis for the application they're about to make to be made at sidebar.

THE COURT: All right. Can you proceed from there, please.

MR. HARRISON: As to the issue that we discussed at sidebar in the previous appearance today, your Honor, I was able to have one of my colleagues do some research over the short break, and I do think that there's some case law that demonstrates that it would potentially be an ethical breach for us and/or us on behalf of our client to turn over the specific information that we discussed potentially turning over.

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1 THE COURT: I told you at sidebar that you'd need to  
2 hand me up copies of any decisions you rely upon and have a  
3 copy for the government.

4 MR. HARRISON: We've got copies of the decisions,  
5 Judge. I'll hand them up in one second.

6 THE COURT: And I hope you've indicated in the  
7 decision what portion we should read.

8 MR. HARRISON: I'm sorry. I didn't hear your Honor.

9 THE COURT: I see you've got a fairly thick set there.  
10 Can you just indicate what you want us to read, the important  
11 part.

12 MR. HARRISON: I could, Judge. That's going to take a  
13 minute.

14 THE COURT: Just as a housekeeping matter, my law  
15 clerk told me that Ms. Stormy Daniels's attorney, Mr. Avanatti,  
16 is not admitted here but wishes to be heard.

17 I'll be glad to hear you.

18 MR. AVANATTI: Your Honor, we appreciate the  
19 accommodation very much.

20 THE COURT: Not at all.

21 MR. AVANATTI: Thank you, your Honor.

22 MR. HARRISON: Judge, I don't know if I can perhaps  
23 short circuit this a little bit. My colleague actually did  
24 prepare a letter to submit to the Court. He just walked down  
25 to court with it, since we had a short break. I just read it

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1 for the first time here. I've got to make a couple of changes  
2 to it, but it is a letter that explains everything that we  
3 could conceivably submit to the Court within a very short  
4 period of time, but what I was going to ask is because of what  
5 I'm concerned about with certain ethical obligations that we've  
6 explained in this letter, I just don't think there's any way  
7 that we can give the Court an answer today. I was going to ask  
8 that we adjourn this issue to Monday, since we're already  
9 adjourned to Monday.

10 THE COURT: There's more than one question so there's  
11 more than one answer. THE question how many clients is one I'm  
12 sure you can answer.

13 MR. HARRISON: I can't give you an exact number, your  
14 Honor.

15 THE COURT: Why not?

16 MR. HARRISON: I don't know how far the documents go  
17 back. Prior to working for the Trump organization, between  
18 2006 and 2017, for instance, my client had other clients. I  
19 don't know if there are -- and I don't have an exact number.  
20 It's a long time ago. That's over 12 years ago. We've got to  
21 go back and be able to look and try and compile a list of  
22 clients from that time period.

23 THE COURT: That doesn't strike me as something that  
24 takes more than a couple of hours if your client focuses on it.

25 MR. HARRISON: I can try and sit down with him and

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1 have him do that, Judge, but it's hard for me to do that from  
2 Pret a Manger up the street and try and comply with the Court's  
3 other orders at the same time and try and do research on this  
4 ethical issue so I make sure I'm not violating any ethical  
5 obligations.

6 THE COURT: I appreciate what you're saying, but you  
7 have a team and I'm expecting the team to be working full time,  
8 given that you're the ones who want emergency relief.

9 MR. HARRISON: We are, Judge. We're working round the  
10 clock. Mr. Huttenlocher was not even on this case until an  
11 hour and a half ago, and he jumped on that research and he  
12 wrote a three-page letter for the Court.

13 THE COURT: Could you please just read out loud the  
14 key portions of the letter.

15 MR. HARRISON: Sure. I'll skip to the reference to  
16 the pertinent case law, your Honor.

17 First, the New York Court of Appeals has stated that  
18 "in discussing whether the attorney-client privilege insulates  
19 a client's identity from disclosure, we have stated on a  
20 previous occasion that notwithstanding opinion to the contrary,  
21 the rule in New York is not so broad as to state categorically  
22 that the privilege never attaches to a client's identity."

23 THE COURT: You're speaking of New York State law.

24 MR. HARRISON: That is a New York State case, Judge.

25 THE COURT: I don't think we should pay too much mind

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1 to that.

2 MR. HARRISON: OK. That particular opinion references  
3 a Southern District of New York opinion, so let me just read  
4 that sentence. The Court of Appeals continued, the New York  
5 Court of Appeals, your Honor, and stated that: "Absent other  
6 circumstances, an attorney cannot be compelled to reveal the  
7 client's identity where the latter is not a party to the  
8 pending litigation. This rule has been applied by courts in  
9 this district"; that is, the Southern District of New York,  
10 your Honor.

11 THE COURT: What case is that and what did it hold,  
12 the Southern District one?

13 MR. HARRISON: Sure. The reference I've got here is  
14 *Elliott Associates L.P. v. Republic of Peru*, and the cite which  
15 I have here is 176 F.R.D. 93, 99 (S.D.N.Y. 1997). The quote  
16 from that is, "The grounds for exempting a client's identity or  
17 location" -- sorry, Judge. I'm just making sure I've got the  
18 right one. The quote is, "The grounds for exempting a client's  
19 identity or location from the scope of the attorney-client  
20 privilege rarely apply where, as here, the client is a  
21 nonparty."

22 There's also a reference to another Southern District  
23 of New York case from 1994, *Allen v. W. Posh Pepperell Inc.*,  
24 848 F.Supp. 423, 431-32. The quote is, "Defendants here have  
25 not made a showing of a need for disclosure of the names of

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1 Mr. Crone's other clients sufficient to overcome the legitimate  
2 fear of retaliation harbored by those clients." And that goes  
3 on to state, I believe, your Honor, if I'm reading this  
4 correctly, if covered by the attorney-client privilege that  
5 identity "cannot be revealed by the attorney without the  
6 client's consent."

7 There's also ethical obligations on the part of  
8 attorneys as they've been interpreted by the New York State Bar  
9 Association, your Honor. In pertinent part, quoting from New  
10 York State Bar Association, Committee on Professional Ethics,  
11 ethics opinion 1088.

12 THE COURT: Again, this is New York State law?

13 MR. HARRISON: That is New York State law, Judge, yes,  
14 which covers ethics.

15 THE COURT: Anything else that's federal law?

16 MR. HARRISON: Federal law. I've got some quotes from  
17 that ethics opinion, but I'll skip that.

18 I don't have any other federal cases cited in this  
19 particular letter, your Honor.

20 Can I just have one second to confer with  
21 Mr. Huttenlocher?

22 THE COURT: Yes.

23 MR. HARRISON: Judge, that's all that we were able to  
24 find in the short period of time that we've had so far.

25 THE COURT: OK. Now, you've referenced how long your

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1 client has been representing the Trump organization.

2 MR. HARRISON: I believe that's correct, Judge, yes.

3 THE COURT: And that began when?

4 MR. HARRISON: I believe it's 2006 that he started  
5 working for the Trump organization, your Honor.

6 THE COURT: At that time did he have any other clients  
7 who continued with him during his representation of the Trump  
8 organization?

9 MR. HARRISON: I don't know the answer to that  
10 question, Judge. I think that he did have other individual  
11 clients. I don't know if they continued with him from his  
12 prior employment, but my understanding is he did have other  
13 individual clients during that period.

14 THE COURT: All right. Your inability to answer these  
15 questions suggests to me that Mr. Cohen should be with you in  
16 court next time so that the Court will have an answer to these  
17 factual questions; that is, the ones that are not privileged.

18 Thank you.

19 MR. McKAY: Your Honor, could I be heard briefly on  
20 this?

21 THE COURT: Yes.

22 MR. McKAY: We'll obviously consider Mr. Cohen's  
23 counsels' letter. We haven't seen a copy yet nor the authority  
24 therein, but it sounds like their cases were referring to  
25 compelling an attorney to disclose client's names.



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1           Here, we're in quite a different situation. Mr. Cohen  
2           is seeking a TRO to assert privilege on behalf of his clients.  
3           The law, federal law in the Second Circuit, is very clear.  
4           This is a quote from a Second Circuit case: "In the absence of  
5           special circumstances, client identity and fee arrangements do  
6           not fall within the attorney-client privilege, because they are  
7           not the kinds of disclosures that would have been made absent  
8           the privilege, and their disclosures do not incapacitate the  
9           attorney from rendering legal advice," *Vingelli v. DEA*, 992  
10          F.2d 449.

11           My colleague has copies for the Court and defense  
12          counsel. We're happy to hand it up.

13           THE COURT: What year was that?

14           MR. McKAY: That was Second Circuit 1993.

15           THE COURT: OK.

16           MR. McKAY: I think it's important to remember that  
17          what's going on here is Mr. Cohen filed a temporary restraining  
18          order. They made a representation to the Court about the vast  
19          amount of attorney-client privileged material that was  
20          allegedly seized. Now they're being asked by the Court to back  
21          up those assertions with just the names of those clients where  
22          there's not privilege. The law is very clear on this. The  
23          attorney-client privilege can't at the same time be used as  
24          both a sword and a shield. The quote for that is the Second  
25          Circuit case of *Bilzerian*, 926 F.2d 1285.

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1           What they are trying to do right now is use  
2 attorney-client privilege as a sword to challenge the  
3 government's ability to review evidence seized pursuant to  
4 lawful search warrants, and then when we contest the factual  
5 allegations that they use as a basis for that motion, they try  
6 to use attorney-client privilege as a shield and refuse to  
7 provide the Court with the information the Court has asked.

8           By their own account, in their brief, the case is a  
9 cause of action in equity. In equitable proceedings, you can't  
10 be trying to use the privilege as both the sword and the  
11 shield. They've deprived the Court of the facts that you've  
12 asked in order to base your decision, and so for that reason,  
13 we think that the Court could deny the application on this  
14 basis alone if they're not willing to turn over the client  
15 list, if you don't have any basis to know that the  
16 representations that are made about the scope of the seizure  
17 have any basis in fact.

18           THE COURT: I must say I find it intriguing that  
19 Mr. Harrison's application to the Court and attendant  
20 memorandum tells me that there are thousands of documents that  
21 the government seized that are subject to attorney-client  
22 privilege. How could you know there are thousands if you can't  
23 answer my question? Please tell me.

24           MR. HARRISON: Sure, Judge.

25           So, I don't have a copy and we haven't been able to

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1 review what the government has seized, so I can't give you an  
2 exact number. I know basically from what was seized that there  
3 are a lot of documents.

4 THE COURT: I'm not asking whether there are a lot.  
5 I'm asking the basis for your contention that there are  
6 thousands and thousands.

7 MR. HARRISON: That is our best understanding without  
8 being able to look at the documents and give the Court an exact  
9 number.

10 THE COURT: How did you get that understanding?

11 MR. HARRISON: Discussions among the defense team,  
12 Judge, about the case.

13 THE COURT: Really?

14 MR. HARRISON: Yes, Judge.

15 THE COURT: Who on the defense team represented that  
16 there are thousands and thousands of privileged documents?

17 MR. HARRISON: Judge, I'm not prepared to get into  
18 internal defense discussions today. I don't think I can  
19 ethically reveal this.

20 THE COURT: What I need to know is whether you have a  
21 basis, as an officer of the court, to tell me that there are  
22 thousands and thousands of privileged documents.

23 MR. HARRISON: I want to be very careful, because I  
24 want to be as up-front with the Court as possible. The  
25 "thousands" is an estimate. I can't tell the Court that it's

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1 exactly a thousand or it's in the thousands. That is my best  
2 understanding without having the documents to look at. That's  
3 an approximation, an estimate of how many documents are  
4 relevant. I don't know the exact number, your Honor.

5 THE COURT: All right.

6 MR. HARRISON: It might be less than a thousand. I  
7 don't know for sure. I haven't had a chance --

8 THE COURT: Did anyone have a basis for telling me  
9 thousands and thousands?

10 MR. HARRISON: Yes, I think we do have a basis.  
11 That's our sort of best guess or best estimate based on what we  
12 know at this time without looking at the actual production.

13 THE COURT: I'm going to want to know your basis for  
14 that.

15 I don't know of any better way to handle this thing  
16 than to adjourn it briefly to allow Mr. Harrison to talk to his  
17 client to find out the approximate number of other clients'  
18 privileged documents that were likely in his possession;  
19 documents or device information, how many, the number, and I  
20 want you to have the names with you. I'm not telling you you  
21 have to give them to me, but I'll be reading the case law and  
22 deciding whether you have to give them to me, so I want you to  
23 have them right there in case I decide you must give them to  
24 me.

25 Yes.

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1 MR. AVANATTI: Your Honor, could I be heard briefly?

2 Your Honor, I dealt with this issue in another case,  
3 just for the Court's benefit, and I think actually the question  
4 is not how many other clients are there. The question is how  
5 many other clients that have not been previously disclosed are  
6 there? Because if Mr. Cohen represented a client and that  
7 client was disclosed to an opponent or another attorney or  
8 there was a lawsuit that was filed, that's no longer privileged  
9 even if it was privileged at some point in time, so we're  
10 talking about a very small subset of clients, and what we're  
11 talking about is clients that consulted Mr. Cohen on a  
12 confidential basis and who were never disclosed to anyone. And  
13 as a practicing attorney, and your Honor knows from your  
14 experience, that's a very small number in the grand scheme of  
15 things, and so I think that's the inquiry, and it should be  
16 able to be answered in short order.

17 I appreciate you giving me the time and opportunity to  
18 address the Court.

19 THE COURT: Thank you very much for that.

20 All right. I suggest that we reconvene at 4 p.m., at  
21 which point I expect Mr. Harrison to be able to answer my  
22 questions so long as I have a basis in law to learn the answer.

23 MR. HARRISON: Judge, I'm going to need more time. I  
24 need to consult internally at our firm with our ethics people  
25 and talk to them about these ethics opinions. I need more time

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1 to do that. I need more time. I'm not going to be able to do  
2 it at 4:00.

3 THE COURT: I believe you can so I want you to try.  
4 If anyone else wishes to be heard, I'll be glad to  
5 hear you.

6 MS. STROM: Your Honor, I'd like to just say one  
7 thing.

8 THE COURT: Please come to the podium.

9 MS. STROM: Thank you.

10 Just to the extent that the names of clients will be  
11 used as a justification for sealing, since we have time to  
12 think about it, I thought I'd put one more case in front of  
13 your Honor, which is the *Bernstein v. Bernstein Litowitz* case.  
14 I know the docket was just put out, so I don't know if that was  
15 in the government's briefing or not, but there, they talked  
16 specifically that a lawyer's ethical obligation to protect  
17 client confidences is more extensive than the very narrow  
18 attorney-client privilege, and generally, the fact that you  
19 represent a client, as was discussed before, is generally,  
20 absent special circumstances, not privileged. So to narrow  
21 even this inquiry, it's not only people that we didn't know  
22 that Mr. Cohen represented before, it's people that have a  
23 special circumstance, that there's some reason that the fact  
24 Mr. Cohen was representing them was privileged, and I can give  
25 you those case cites if you hold on.

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1 All right. The *Bernstein v. Bernstein Litowitz* case  
2 is 814 F.3d 132 (2d Cir. 2016). That's the one that talked  
3 about the ethical duty is broader than the attorney-client  
4 privilege. And then the fact -- sorry. I had associates  
5 working hard over the time that we were out.

6 The fact that generally, the fact that a lawyer  
7 represents a client is not privileged, the name of which case  
8 my email isn't picking up right now, is *Vingelli v. U.S. Drug*  
9 *Enforcement Agency*. That's also Second Circuit 1993, case cite  
10 992 F.2d 449.

11 To the extent that this is the reason that they want  
12 sealing, we would argue that there needs to be a special  
13 circumstance that the fact they were clients of Mr. Cohen  
14 should be deemed privileged.

15 THE COURT: All right.

16 Now, we discussed this morning your suggestion that  
17 pseudonyms could replace the actual names. I think everyone is  
18 operating on the premise that pseudonyms can be used.

19 MS. STROM: Absolutely. If there is a reason to use a  
20 pseudonym, that seems like a reasonable alternative.

21 THE COURT: All right. Anything else?

22 MS. STROM: That's it, your Honor. Thank you.

23 THE COURT: OK. Thank you. See you at 4.

24 (Recess)

25 THE COURT: Good afternoon. Please have a seat.

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1 I'd like to begin by asking Mr. Harrison his view of  
2 whether the colloquy at sidebar can be unsealed.

3 MR. HARRISON: I don't think we have an objection,  
4 Judge.

5 THE COURT: All right. It will be unsealed  
6 immediately.

7 I'll turn now to Mr. Harrison to give me the  
8 information that I sought.

9 MR. HARRISON: Judge, I believe you asked us to answer  
10 two questions. The first one was our basis for the assertion  
11 in our papers that we believe, or we estimate that there are  
12 thousands of privileged documents that have been seized.

13 THE COURT: Thousands and thousands.

14 MR. HARRISON: I'm sorry. What, Judge?

15 THE COURT: I think you said thousands and thousands.

16 MR. HARRISON: I think we just said thousands, but I  
17 don't object, Judge.

18 THE COURT: OK. Go ahead.

19 MR. HARRISON: We make pretty clear in our papers,  
20 Judge, that there are, at least as we understand it, two  
21 general categories of what we believe to be privileged  
22 documents. One is between Mr. Cohen and his clients, and the  
23 other category of privileged communications is between  
24 Mr. Cohen and his attorneys.

25 Mr. Cohen's involved in a number of different ongoing



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1 legal issues right now, and he has attorneys another more than  
2 one firm and he has attorney-client privilege for those  
3 communications. Based on that, I think we're pretty confident  
4 that there are thousands of privileged communications. Again,  
5 we haven't seen what the government seized. I haven't reviewed  
6 it. I don't have an exact count for you, but there is that.

7 In addition to that, Judge, we don't know exactly how  
8 far back in terms of the time period the seized materials go,  
9 but just so the Court understands, prior to working for the  
10 Trump organization, my understanding is that Mr. Cohen was an  
11 attorney for over 20 years before that, with clients, so we  
12 believe, we assume that a lot of those communications, that  
13 there were privileged communications with clients during that  
14 period, and those may well be encompassed in the materials that  
15 the government seized, because they seized a lot of stuff.

16 THE COURT: I think your premise is that some of these  
17 date back at least 30 years, and that the attorney would have  
18 kept that in his office?

19 MR. HARRISON: Well, I think, and I didn't have a  
20 chance to check this, the beginning of the time period of the  
21 Trump organization, I think he started there in 2006, so that  
22 would be 12 years going back as far as we go back. We don't  
23 know what time period is in the seized materials.

24 Based on that and based on what we've also clearly  
25 included in our memo, a reference to privileged communications

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1 between Mr. Cohen and his own lawyers, that's where we get the  
2 basis from, Judge, to say that there were thousands and  
3 thousands.

4 THE COURT: Thank you.

5 MR. HARRISON: As to an approximate number of clients,  
6 I don't have an approximate number of clients, but I'm  
7 confident in telling the Court as an officer of the court right  
8 now, I need more time. We need more time to really analyze  
9 that question. As the government has pointed out, whether or  
10 not someone is a client is not necessarily a black-and-white  
11 issue. Mr. Cohen did have a relationship.

12 THE COURT: Just a moment. The question has to do  
13 with attorney-client privilege. It doesn't have to do with his  
14 business clients.

15 MR. HARRISON: I understand that, Judge, but that's  
16 sort of why it's a more complicated issue than it would be, I  
17 think, for instance, for, say, me or other attorneys who work  
18 only at law firms. Mr. Cohen had his own individual clients.  
19 He also had an affiliation with another major law firm.

20 THE COURT: Of brief duration.

21 MR. HARRISON: Relatively brief, Judge, but still not  
22 really brief, not like a week or two.

23 We're still trying to work through whether those are  
24 considered as clients or not, and that obviously has an impact  
25 on Mr. Cohen and an impact on what representations we're going

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1 to make about that law firm and whether they were shared  
2 clients or the law firm's clients or Mr. Cohen's clients. It's  
3 not an easy issue to figure out.

4 I know the Court is attuned to this issue. I know the  
5 Court wants us to respond with as much specificity as possible,  
6 but we need time to work through those issues. All I'm asking  
7 is that you give us until Monday to give you an answer that I  
8 feel more confident in giving to the Court as an officer of the  
9 court.

10 THE COURT: All right. Can you get me the answer by  
11 10 a.m. Monday and get the government the answer. Then people  
12 will have a chance to consider what to agree with and what not  
13 to.

14 MR. HARRISON: I think so, your Honor. I will do my  
15 best, and we will try and meet that 10 a.m. deadline. I don't  
16 know of a reason right now why we couldn't, and we will try and  
17 meet that deadline.

18 THE COURT: Will you have access to your client, or  
19 are you telling me you don't know whether you will?

20 MR. HARRISON: I believe I'll have access to him over  
21 the weekend, yes, Judge.

22 THE COURT: All right. I'm directing that he be here  
23 present with you at counsel table at 2 p.m. so that we don't  
24 need to have many more adjournments.

25 Mr. McKay, does the government wish to be heard?

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1 MR. McKAY: Yes, your Honor.

2 We seized evidence pursuant to judicially authorized  
3 search warrant on Monday. Since Monday, we have had the legal  
4 authority to review that evidence for the crimes that were set  
5 forth in the detailed affidavit.

6 After Mr. Cohen's counsel contacted us asking us to  
7 stop our review, and then after he filed the temporary  
8 restraining order, we ceased our review of this important  
9 evidence, first as a courtesy and then in light of the pending  
10 motion, but every day that goes by is a day that we are  
11 lawfully allowed to review this evidence and further our  
12 investigation, and we're not able to.

13 Mr. Cohen's counsel says he needs more time, but this  
14 is their motion. They made a motion for extraordinary  
15 temporary relief asking us not to review lawfully seized  
16 materials. As the reason for the immediacy, which is the  
17 subject heading in Mr. Harrison's affidavit at page 36, he  
18 says, "the seized materials contain thousands, if not millions,  
19 of pages of documents that are protected by the attorney-client  
20 privilege and/or the attorney work product doctrine."

21 Now, today he can't tell you how many clients  
22 Mr. Cohen has or how many documents are out there. He's  
23 walking back those representations, which were the premise of  
24 their motion. We're now here for the third today. The defense  
25 still cannot provide the Court with the information that the

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1 Court needs to make the decision. They've talked about their  
2 ethical obligations under Rule 1.6 of the ethical rules that  
3 say that you can disclose a client name when permitted or  
4 required under these rules or to comply with the law or a court  
5 order.

6 Now the Court has directed them to provide a client  
7 list, and there's no ethical obligation there. As we've  
8 discussed, the case law is clear that the fact of the client  
9 list is privileged.

10 But Mr. Cohen's counsel --

11 THE COURT: But the fact of the client list is not  
12 privileged.

13 MR. McKAY: Not privileged, correct.

14 They put themselves in this place by filing a TRO and  
15 asking for this extraordinary relief, and now they are delaying  
16 the government's investigation because they can't come up with  
17 the facts that are necessary to predicate their motion. It's  
18 their burden to show likelihood of success on the merits. This  
19 is a quote from a Second Circuit case, "A TRO is an  
20 extraordinary and drastic remedy, one that should not be  
21 granted unless the movant, by a clear showing, carries the  
22 burden of persuasion." The cite for that is *JBR, Inc.*, 618  
23 F.App'x 31, a 2015 Second Circuit case.

24 Your Honor, we respectfully submit that the Court  
25 should conclude right now that the defense has failed to meet

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1 that burden, because their failure to provide the basic facts  
2 that support their motion is, I think, fatal in a couple  
3 different respects, and I'd like to briefly describe those.

4 The first is the very premise of their argument is  
5 that an attorney's office has special protections, that in  
6 extreme cases, like the *Lynne Stewart* case, it requires the  
7 appointment of a special master to protect the privilege. But  
8 if Mr. Cohen and his counsel can't substantiate his assertions  
9 about the thousands, if not millions, of documents of  
10 privileged material, this case is not like the *Lynne Stewart*  
11 case. It's not like the *Lynne Stewart* case for a couple of  
12 other reasons, which I've talked about and we've briefed, but  
13 it brings us quite squarely into the run-of-the-mill case in  
14 which an individual, who may at times seek advice from  
15 attorneys, has his evidence or his documents or his hard drives  
16 seized and in that evidence there is some attorney-client  
17 communication. The common practice for such cases in this  
18 district is a filter team like we propose. The failure to  
19 substantiate the amount of documents and the number of clients  
20 takes us out of the law firm realm and squarely into the realm  
21 of cases like *Grant* and *Winters* that we cite in our brief.

22 The second point is that whether it's defense  
23 counsel's primary proposal, where they get to make the first  
24 review, or it's the special master context, where defense  
25 counsel will get to make privilege claims to the special master

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1 and the government filter team will be able to see the  
2 documents, both situations require defense counsel to have an  
3 honest and complete and clear picture of who his clients are  
4 and what sorts of attorney-client relationships exist.

5 In light of what has transpired, in their motion and  
6 their declaration, I'm not sure the Court can have faith that  
7 defense counsel is going to fairly participate in that process  
8 in the way that would be required to make it work.

9 What the Court should do instead is exactly what is  
10 proposed, a filter team made up of walled-off AUSAs, which will  
11 make an honest and accurate sorting of privilege from  
12 nonprivileged, and even despite what I've said, we still intend  
13 to follow the procedure that we set forth in our brief, which  
14 is that in a certain class of documents or communications, we  
15 provide the defense with the ability to make objections to our  
16 designation of something as not privileged, and in such  
17 circumstances, if there was disagreement, it could be taken up  
18 with the Court.

19 This is exactly the issue that Judge Jones flagged in  
20 the *Grant* case, because if you've got defense counsel, and even  
21 in the special master context, making wildly overbroad claims  
22 of privilege and the government has got a hand tied behind its  
23 back because it can't see the documents, you're not going to  
24 have an efficient process.

25 Your Honor, for all those reasons, we think you can

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1 and should deny Mr. Cohen's motion right now. I think the  
2 delay, and this has clearly been a delay tactic from the  
3 outset, their failure to be able to back up their facts is  
4 clearly fatal to their argument. For that reason, we think you  
5 should deny the motion now.

6 I'll note that I say this with respect to Mr. Cohen's  
7 motion. I think he's failed to meet his burden. Obviously, at  
8 this time, the Court has allowed President Trump to intervene  
9 to assert his own interest as the privilege holder. We don't  
10 object, given the Court has already set a briefing schedule for  
11 President Trump's counsel and a hearing Tuesday at which we can  
12 address his privilege claims, but we think Mr. Cohen has  
13 utterly failed in his motion at this time and that you can and  
14 should deny it so that, on Monday, all we should be considering  
15 is a narrower set of documents, which are any documents that  
16 might have a plausible claim of privilege by President Trump  
17 asserting his own interest as a privilege holder, but not all  
18 of Mr. Cohen's documents where he's trying to make these  
19 overbroad privilege claims.

20 THE COURT: All right.

21 Yes.

22 MR. HARRISON: Quick response, Judge.

23 I think that turns things on its head to say we put  
24 ourselves in this place. This has happened because the  
25 government seized the documents, and they told us that they



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1 were going to start reviewing.

2 THE COURT: I mentioned that today.

3 MR. HARRISON: Yes, and they told us they were going  
4 to start reviewing by today at noon, so we had to file  
5 something.

6 We're not delaying. All I'm asking for, basically for  
7 the reasons I've already put in front of the Court, is to give  
8 us until 10 a.m. on Monday to answer the Court. That's all we  
9 ask.

10 THE COURT: I'm going to give you that time, but I  
11 expect that in return, there will be a good faith effort on the  
12 part of counsel to be able to answer the Court's factual  
13 questions, and if you don't have the answers by 2 p.m. on  
14 Monday, I'm likely to discount the argument that there are  
15 thousands, if not millions, of privileged documents.

16 Now, I want to be sure I understand the government's  
17 proposal with respect to when defense counsel can review  
18 documents as to which the government finds no privilege. I had  
19 understood one thing from the government's submission, but what  
20 I understand now is that as soon as the government taint team,  
21 if that's who is the first reviewer, identifies a set of  
22 documents or any documents that it views as not privileged, it  
23 will then show them to defense counsel. Is that right?

24 MR. McKAY: No, your Honor. It's a narrower subset.

25 Just to give a concrete example, let's say that we

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1 know for a fact that someone named John Smith is not an  
2 attorney for Mr. Cohen, he's not a client of Mr. Cohen. In the  
3 initial review, what we would do is we'd get the client list  
4 from Mr. Cohen, if one can be made, and we'll get an attorney  
5 list for Mr. Cohen. We will run keyword searches. All the  
6 evidence will be in an electronic database. We'll run searches  
7 designed to segregate any emails that are to or from or  
8 documents that involve clients or attorneys.

9 Out of that subset, the filter or taint review team  
10 will review the documents for privilege. If Mr. Cohen has  
11 exchanged an email with an attorney who represents him in a  
12 matter -- let's say it's Mr. Harrison -- and it's clearly  
13 privileged, the filter team will designate it as such and there  
14 will be no need to present it to the Court or to defense. But  
15 let's say the email did something that very obviously waived  
16 the privilege, like copied a third party on the email -- so  
17 Mr. Cohen emails Mr. Harrison and the Court is cc'd -- we'd  
18 likely take the position that that waives any privilege in that  
19 email, and we'd designate that as nonprivileged.

20 The other example might be, let's say, there's an  
21 email between Mr. Cohen and his client and the filter team or  
22 taint team believes that they've got a showing as to the crime  
23 fraud exception. In those instances where there's a document  
24 that is sort of presumptively privileged because it's to or  
25 from an attorney or a client, and the government filter team

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1 nevertheless thinks it's not privileged, that's the situation  
2 in which we present our finding to defense counsel and say, Do  
3 you object to this?

4 But in the broader scope of things, if Mr. Cohen has  
5 an email with his plumber saying, Hey, can you come fix my  
6 sink, and we know that this is a plumber, and the filter team  
7 sees that, they're just going to mark that not privileged  
8 because it's very obvious, and we don't need to burden defense  
9 counsel or the Court with arguing about privilege over what is  
10 likely to be the vast majority of documents that are very  
11 obviously not privileged.

12 What we're focused on is consulting with the defense  
13 in instances where there's some plausible reason to believe  
14 that the document might be privileged.

15 I should say we've asked the defense in our initial  
16 letter to give us its client list, attorney list and any sort  
17 of input on the review. The devil may be in the details on  
18 this. If there are particular adjustments that the Court  
19 thinks are appropriate to the procedure or that defense counsel  
20 thinks are appropriate to the procedure, we're willing to  
21 discuss those, of course.

22 What we have proposed is as I just described, but we  
23 think that's the most efficient process. That's the process  
24 that we're using, by the way, in many of our cases that have  
25 these filter teams. We think that's a fair and efficient way

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1 to tee up with defense counsel the narrowest universe of  
2 documents where there might be a dispute, because we think that  
3 the vast majority of things are going to be obviously  
4 nonprivileged, no reason to argue about it, and there are going  
5 to be certain things that are very obviously privileged, we're  
6 going to mark them as such, and the filter team is never going  
7 to release them.

8 THE COURT: Thank you.

9 I'd like to note something that may not have been  
10 obvious this morning.

11 When I was asking the plaintiff's counsel about the  
12 names of clients, I had in mind not the immediate use of the  
13 names for which pseudonyms could be substituted. What I had in  
14 mind was that the government would need those names if it were  
15 to do the type of search that is suggested, and so we do need  
16 to decide whether those names must be divulged.

17 I looked at all of the cases that counsel cited, and  
18 it's quite clear, under Second Circuit law, that the identity  
19 of a client is not privileged unless the mere identification of  
20 the client gives away what advice was given or what advice was  
21 sought, and that that would be incriminating.

22 We are left with the need for you to at least have in  
23 hand, Mr. Harrison, the identity of the other clients, not  
24 business clients but clients who sought legal advice from  
25 Mr. Cohen as an attorney.

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1 Yes.

2 MR. McKAY: May I make one request, your Honor?

3 THE COURT: Yes.

4 MR. McKAY: Obviously you've given defense counsel  
5 until Monday to come up with the names of the clients. I think  
6 the case law is also clear that the burden of establishing  
7 attorney-client privilege rests on the person asserting it. In  
8 light of the fact that the Court has given the defense numerous  
9 opportunities to come up with a list and it can't, we're  
10 concerned that whatever list is going to come on Monday morning  
11 is going to be something that's difficult to substantiate.

12 The case law is also clear that the Court is permitted  
13 to require, because there is this *prima facie* burden, some  
14 substantiation of the attorney-client relationship. The case  
15 I'm thinking of is actually the case they cited earlier this  
16 morning, *Elliott Associates*, 176 F.R.D. 93 at 97, which says,  
17 "courts permit questions necessary to test the factual  
18 grounding of an asserted attorney-client privilege."

19 I think in light of what has transpired today, it  
20 would be appropriate for defense counsel to give us not just  
21 names but some substantiation, whether that's a retainer  
22 agreement or some indicia of attorney-client relationship, and  
23 if whatever that indicia is is something that they believe is  
24 privileged, we don't have an objection to them presenting it to  
25 the Court on an *ex parte* base, because we don't want to see

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1 that privileged information. But I do think just a bare list  
2 of names may result in a situation where we say, your Honor, we  
3 have reason to think that some of these names aren't actually  
4 names with which he had an attorney-client relationship, that  
5 they were business relationships.

6 Given the extra time that you've given defense  
7 counsel, we think it's also reasonable to ask for  
8 substantiation, so that on Monday morning we don't find  
9 ourselves with yet another adjournment while they find the  
10 substantiation for those claims.

11 THE COURT: That's right. I thought maybe you were  
12 going to raise the question of whether they had the burden of  
13 contacting the clients and seeing if the clients waive the  
14 privilege or insist upon it.

15 MR. McKAY: As we've discussed, the release of the  
16 identity of the client isn't privileged, so for just giving the  
17 names, I don't think there's any privilege waiver required.

18 If you're asking for underlying substantiation --

19 THE COURT: Yes.

20 MR. McKAY: -- I suppose there might be, although I  
21 don't know that presenting something *in camera* to the Court  
22 would waive the privilege.

23 THE COURT: I don't think it would.

24 MR. McKAY: If there are concerns about disclosing  
25 privileged information to substantiate the claim, we don't

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1 object to an *ex parte* showing, whether it's retainer agreement  
2 or whatever, but we do think that there needs to be some actual  
3 substantiation for whatever claim we get on Monday morning so  
4 we don't find ourselves with another adjournment.

5 THE COURT: All right.

6 Mr. Harrison, I think Mr. McKay's point is well-taken.  
7 Do you disagree?

8 MR. HARRISON: I'm not sure, Judge. I'll take a look  
9 at the case and think about how we can do that. It depends on  
10 what "substantiation" has to mean. I'll take a look at it,  
11 Judge, and we'll do our best to be prepared on Monday to show  
12 something or to make a representation to the Court.

13 THE COURT: I would like to have that in your 10 a.m.  
14 letter.

15 MR. HARRISON: Understood, Judge.

16 THE COURT: In other words, if you do need to be  
17 prepared to substantiate that the relationship was a  
18 lawyer-client relationship, I need to know that by 10 a.m.

19 MR. HARRISON: I understand, your Honor.

20 THE COURT: Would anyone else like to be heard?

21 Yes, Mr. Riley.

22 MR. RILEY: Judge, we have a docket number for the  
23 case.

24 THE COURT: Yes.

25 MR. RILEY: And it includes the government's filing.

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1 There is nothing else. The petition that originally initiated  
2 this isn't filed. There's no notation that it even exists, and  
3 we would request that it be filed and unsealed.

4 There's also no indication of any minute entries as to  
5 any action you've taken. I'm not trying to interview you, but  
6 I don't actually know whether you've issued a TRO or not.

7 THE COURT: I have not.

8 MR. RILEY: So any action leading up to today we would  
9 hope would be in the docket.

10 THE COURT: All right. There should be in the docket  
11 the application made by Mr. Cohen's lawyers with only three  
12 paragraphs redacted.

13 I think it's three. Yes, it is three.

14 MR. HARRISON: I think that's right, Judge. I'll  
15 check.

16 THE COURT: The government response, I believe, has  
17 been docketed.

18 MR. McKAY: It has, your Honor.

19 THE COURT: I think you will find those in the docket.

20 MR. RILEY: Thank you.

21 THE COURT: The memorandum of law, my recollection as  
22 to where I last left it with my law clerk, was that Mr. Cohen's  
23 counsel was going to review the memorandum of law and give me  
24 proposed redactions. The government agrees with him. If that  
25 hasn't already been filed, it will be filed.



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1 MR. RILEY: Thank you, Judge.

2 THE COURT: Anything else?

3 MS. STROM: Will the submission from President Trump  
4 on Sunday and Mr. Cohen on Monday morning be publicly filed as  
5 well?

6 THE COURT: I don't know whether any privilege will be  
7 claimed, but I would think they'd be public.

8 MS. STROM: Because the presumption of access to this  
9 proceeding was it would attach to any documents that would be  
10 filed in this proceeding, so if anything was going to be asked  
11 for sealing, it would have to meet the four-part standard that  
12 we discussed this morning.

13 THE COURT: Yes, and apply to the Court and get a  
14 ruling.

15 MS. STROM: Yes. Thank you, your Honor.

16 THE COURT: All right. Thank you.

17 We're adjourned.

18 (Adjourned)